

TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

Environmental Fee

Department Reference Number: R-2006-03

Office of Administrative Law Notice File Number: Z-07-0427-05

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to adopt California Code of Regulations, title 22, division 4.5, chapter 19, section 69269.1.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

A written comment period has been established commencing on May 11, 2007 and closing on June 27, 2007. DTSC will hold a public hearing on the proposed regulations at 10:00 a.m. on June 27, 2007 in the Byron Sher Auditorium, 2nd Floor, 1001 "I" Street, Sacramento, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on June 27, 2007 will be considered.

Representatives of DTSC will preside at the hearing. Persons who wish to speak are requested to register before the hearing. Pre-hearing registration will be conducted at the location of the hearing from 9:30 a.m. to 10:00 a.m. Registered persons will be heard in the order of their registration. Any other person wishing to speak at the hearing will be afforded an opportunity after the registered persons have been heard.

Due to enhanced security precautions at the Cal/EPA Headquarters Building located at 1001 I Street, Sacramento, all visitors are required to sign in prior to attending any meeting. Sign-in and badge issuance occur in the Visitor and Environmental Services Center. This Center is located just inside and to the left of the building's public entrance. Depending on their destination and the building security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification cards. Depending on the size and number of meetings scheduled on any given day, the security check-in could take from three to fifteen minutes. Please allow adequate time to sign in before being directed to your meeting.

If you have special accommodation or language needs, please contact Laura Hayashi, Regulations Coordinator, Regulations Section, at (916) 322-6409 or by e-mail at

regs@dtsc.ca.gov by June 11, 2007. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

In accordance with the California Government Code and Americans with Disabilities Act requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette (etc) as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact Laura Hayashi at (916) 322-6409 or by e-mail at regs@dtsc.ca.gov.

AUTHORITY AND REFERENCE

These regulations are being proposed under the authority of Health and Safety Code sections 25205.6 and 58012 (Added by Gov. Reorg. Plan No. 1, §146, eff. July 17, 1991.) The statutory references are Health and Safety Code sections 25205.6 and 25501.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

- 1) Requires DTSC, on or before November 1 of each year, to provide the Board of Equalization (BOE) with a schedule of codes consisting of corporations and organizations that use, generate, store, or conduct activities related to hazardous materials, as defined, including, but not limited to, hazardous waste. The schedule consists of identification codes from either the Standard Industrial Classification (SIC) system established by the U.S. Department of Commerce, or the North American Industry Classification System (NAICS) adopted by the U.S. Census Bureau.
- 2) Establishes an annual fee schedule as follows:
 - a) \$200 for those organizations with 50 or more employees, but less than 75 employees;
 - b) \$350 for those organizations with 75 or more employees, but less than 100 employees;
 - c) \$700 for those organizations with 100 or more employees, but less than 250 employees;
 - d) \$1,500 for those organizations with 250 or more employees, but less than 500 employees;

- e) \$2,800 for those organizations with 500 or more employees, but less than 1,000 employees;
 - f) and, \$9,500 for those organizations with 1,000 or more employees.
- 3) The fee paid by those organizations is placed into the Toxic Substances Control Account (TSCA) pursuant to Health and Safety Code section 25173.6, to be available to DTSC upon appropriation by the Legislature.
 - 4) Defines that the number of employees employed by an organization is the number of persons employed in the state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due.
 - 5) Establishes that the fee rates (above) are the rates for the 1998 calendar year. Beginning with the 1999 calendar year, and for each calendar year thereafter, the BOE will adjust the rates annually to reflect increases or decreases in the cost of living during the prior fiscal year, as measured by the Consumer Price Index issued by the Department of Industrial Relations or by a successor agency.
 - 6) Outlines specified mandatory payments to fund the State's obligations to the federal government under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), more commonly known as Superfund.
 - 7) Exempts from the environmental fee a nonprofit corporation primarily engaged in the provision of residential social and personal care for children, the aged, and special categories of persons with some limits on their ability for self-care, as described in SIC Code 8361 of SIC Manual published by the United States Office of Management and Budget, 1987 edition.

Policy Statement Overview

DTSC is responsible for implementing three core program activities: regulating the generation, transportation, disposal and management of hazardous waste; cleaning up sites contaminated with hazardous substances; and identifying ways to prevent or reduce the amount of hazardous waste produced in California. To fund these programs, DTSC levies two types of fees. The first type consists of fees assessed on persons who are engaged in specific, regulated activities, including the generation, transfer and disposal of hazardous waste, and the operation of hazardous waste treatment, storage and disposal facilities. Fees of this nature are based on a "polluter pays" principle wherein persons engaged in these activities are responsible for paying DTSC's regulatory and oversight costs.

The other type of fee that DTSC assesses is a broad-based fee. Unlike the regulatory fees described above, which are based on specific hazardous waste activities, DTSC

levies its broad-based fee, the environmental fee, on businesses engaged in activities that are carried out using products, equipment or services that cannot be produced or provided without adding to the general hazardous waste regulatory problem. The premise underlying a broad-based fee like the environmental fee is that at least some aspects of the hazardous waste regulatory problem derive from the basic operational characteristics of advanced economies, which are dependent on the use of chemicals and other hazardous substances to produce goods and services.

Modern societies rely on many products – computers, copiers, cell phones, household and industrial chemicals, printed material, plastics – that are manufactured using chemical feedstocks and chemical processing techniques. In many cases, it is not just the production of the product that creates hazardous waste; rather, the product itself becomes a hazardous waste after it has served its useful life and is discarded. Because the use of these products is ubiquitous, DTSC's broad-based environmental fee casts a wide net to include all businesses that depend on modern day products to function. DTSC uses the revenues from the environmental fee to pay the costs of the more general, public-health related aspects of the hazardous waste program, including cleanup of "orphan" toxic waste sites, laboratory activities, toxic risk assessment, and pollution prevention.

Environmental Fee

The environmental fee was established in 1989 by Senate Bill (SB) 475 (Stats. 1989, ch. 269) to provide DTSC with a broad-based revenue source to supplement the fees it was already receiving from businesses that generate, store, transport or dispose of hazardous waste. The environmental fee does not require that a business be involved with hazardous waste, only that it conducts activities in this State related to hazardous materials (Health & Saf. Code, § 25205.6, subd. (b)). Since all businesses use products that contain hazardous materials, such as computers, printers, automobiles, fluorescent lights and cleaning products, the fee applies to all businesses with 50 or more employees unless they are specifically exempted. The environmental fee does not apply to banks and insurance companies, which under the California Constitution pay a corporate tax in lieu of all other taxes. In 1994, Assembly Bill (AB) 3540 (Stats. 1994, ch. 619) exempted nonprofit residential care facilities from having to pay the environmental fee.

Prior to 1998, the environmental fee was used to fund both hazardous waste management and site mitigation program activities. In 1995, SB 1222 (Stats. 1995, ch. 638) required the Secretary for Cal/EPA to convene a task force to review DTSC's hazardous waste fee structure and make recommendations on a new fee system by January 1, 1997. The Fee Reform Task Force was composed of representatives from regulated businesses, general industry, labor unions, the Legislature, and environmental organizations. The Task Force concluded that DTSC's regulatory costs should be funded from fees on regulated industries and that DTSC's site mitigation costs should be funded from the parties responsible for contaminating the sites. When

responsible parties cannot be located or are insolvent, the Task Force recommended that site cleanup costs be funded from the environmental fee. The Task Force selected the environmental fee because it wanted to use a broad-based revenue source for cleanup costs in situations where no specific business could be held responsible.

The Legislature enacted the Task Force's recommendations with SB 660, (Stats. 1997, ch. 870) which raised the environmental fee rates and designated it as the primary funding source for DTSC's Site Mitigation and Brownfield Reuse Program and its Science, Pollution Prevention and Technology Development Program. SB 660, in essence, created a funding "firewall" between DTSC's regulatory programs and its site mitigation/general support activities. Funding sources that support DTSC's hazardous waste regulatory costs include the generator fee, disposal fee, activity fee (facility permit activity), annual facility fee, EPA identification fee, manifest fee, and money collected from cost recovery efforts for corrective actions. In contrast, funding for DTSC's site cleanup and pollution prevention activities comes from the environmental fee, fines and penalties collected from actions brought by DTSC, recovery of DTSC's costs to oversee cleanup activity of contaminated sites, interest and other revenue, and until 2001, General Fund revenue.

The rates for the environmental fee, which are adjusted annually to reflect changes in the cost of living as measured by the Consumer Price Index, are based on the number of employees that are employed by a business in the State for more than 500 hours during the previous calendar year for which the fee is due.

Proposed Regulations

The proposed regulations are required by order of the California Supreme Court in *Morning Star Company v. State Board of Equalization* (2006) 38 Cal. 4th 324. In its April 24, 2006, ruling the Court reversed a Court of Appeals decision and ruled that DTSC violated the Administrative Procedures Act (APA) and that the department must formally promulgate a regulation for the proper implementation of the environmental fee. The Supreme Court determined DTSC's policy is a reasonable interpretation of the law, but not the only interpretation. The Court stated that DTSC's provision of all the SIC codes to BOE was a reasonable basis for assessing the environmental fee, but noted it didn't meet the test of "the only legally tenable interpretation" of the statute. Thus, because the policy is not the only possible interpretation and applies statewide, it should have been adopted as a formal regulation, according to the Court, with the customary APA requirements of advance notice, public comment, and review by an independent office that measures it against the law passed by the Legislature.

The proposed regulations clarify Health and Safety Code section 25205.6 by defining key terms associated with the environmental fee and identifies authoritative references that identify materials that pose a significant present or potential hazard to human health or safety, or to the environment, if released into the environment.

The proposed regulations will include information specifying one or more hazardous materials that causes each two-digit SIC code to be included on the list subject to the environmental fee.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

The environmental fee regulation is not considered a “project” under California Code of Regulations, title 14, section 15378, subsection (b)(4).

PEER REVIEW

Under the provisions of Health and Safety code section 57004, peer review is not required because the proposed regulations do not establish a regulatory level, standard or other requirement subject to scientific peer review. The proposed rule is considered an administrative standard that does not require peer review.

BUSINESS REPORT

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3, subdivision (c).

FISCAL IMPACT ESTIMATES:

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies.

Cost or Savings to Any State Agency: DTSC has made a preliminary determination that the proposed regulations will have no impact on State revenue or costs.

Cost or Savings in Federal Funding to the State: DTSC has made a preliminary determination that the proposed regulation will have no impact on Federal revenue or costs.

Effect on Housing Costs: DTSC has made a preliminary determination that the proposed regulation will have no impact on housing costs.

Cost Impacts on Representative Private Persons or Businesses:

DTSC is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant Statewide Adverse Economic Impact on Businesses:

DTSC has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states. The regulations included herein are for an existing program, the environmental fee, which has been in place since 1989. The regulation will not result in any increase in fees or taxes above the amounts that are assessed currently.

Effect on Small Businesses:

DTSC has determined that provisions of this rulemaking will have no effect on small businesses. Business organizations with fewer than 50 employees are not subject to the environmental fee.

CONSIDERATION OF ALTERNATIVES

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of DTSC would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action. DTSC invites interested persons to present arguments, with respect to the various options, at the scheduled hearing, or during the written comment period.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Laura Hayashi of DTSC's Regulations Section as specified below. In addition, the rulemaking record, which contains all the information upon which this proposal is based, is available for inspection at the address listed below.

POST-HEARING CHANGES

After the close of the comment period, DTSC may adopt the proposed regulations. If, pursuant to Government Code section 11346.8, subdivision (c), sufficiently related changes are made, the modified text will be made available for comment for at least 15 days prior to adoption. Only persons who requested notification of modified changes, provided written or oral testimony at the hearing, or submitted written comments on these specific regulations will be sent a copy of the modified text.

Once regulations have been adopted, DTSC prepares a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed comments and includes other materials, as required by Government Code section 11346.9. Copies of the Final Statement of Reasons may be obtained from Ms. Hayashi at the address listed below. A copy of the Final Statement of Reasons will also be posted on DTSC's Internet site at <http://www.dtsc.ca.gov>, along with the date the rulemaking is filed with the Secretary of State and the effective date of the regulations.

CONTACT PERSONS

Inquiries regarding technical aspects of the proposed regulations may be directed to Kyle Gardner of DTSC at (916) 322-2448 or, if unavailable, Dennis Mahoney of DTSC at (916) 324-0339. However, such oral inquiries are not part of the rulemaking record.

Statements, arguments or contentions regarding the rulemaking and/or supporting documents must be submitted in writing or may be presented orally or in writing at the public hearing in order for them to be considered by DTSC before it adopts, amends or repeals these regulations. To be included in this regulation package's mailing list, and to receive updates of this rulemaking, please visit <http://www.calepa.ca.gov/Listservs/dtsc/> and subscribe to the applicable Listserv. You may also leave a message on the DTSC mailing list phone line at (916) 324-9933 or e-mail: regs@dtsc.ca.gov.

Please direct all written comments, procedural inquiries and requests for documents by mail, e-mail or fax to:

Laura Hayashi, Regulations Coordinator
Regulations Section
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Laura Hayashi's phone number is (916) 322-6409. If Ms. Hayashi is unavailable, please call Nicole Sotak, Chief of Regulations Section, at (916) 327-4508.